



Comptroller General  
of the United States

Washington, D.C. 20548

74996

## Decision

**Matter of:** Innovative Refrigeration Concepts

**File:** B-252357

**Date:** June 9, 1993

Roger K. Singh for the protester.  
Gary O. Kauffman for K.C & C Service Inc., an interested party.  
Roseann Sendek, Esq., and Maj. Bobby G. Henry, Jr., Department of the Army, for the agency.  
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Under a brand name or equal solicitation, a bid offering non-brand name products was properly rejected as non-responsive where the descriptive literature furnished with the bid did not show that the offered products conformed to the salient characteristics listed in the solicitation.

### DECISION

Innovative Refrigeration Concepts (IRC) protests the rejection of its bid and the award of a contract to K.C & C Service Inc., under invitation for bids (IFB) No. DAKF19-93-B-0002, issued by the Department of the Army for a chiller system and condensers.

We deny the protest in part and dismiss it in part.

The IFB, issued as a total small business set-aside on a brand name or equal basis, requested bids on eight line items. The IFB specified a Technical Systems, Inc. chiller system (line item 0001) and Technical Systems, Inc. condensers (line items 0002 through 0008) as the brand name items. The IFB required bidders offering equal products to identify in their bids the product or products being offered and to furnish descriptive literature with their bids establishing that the products offered met the salient characteristics listed in the IFB for the Technical Systems products. Bidders were cautioned that bids offering equal products would be considered for award only if the products were shown to comply with the listed salient characteristics.

Seven bidders responded by the December 16 bid opening date. The protester, which offered products of its own manufacture, submitted the apparent low bid for line items 0002 through 0008. The agency reviewed the descriptive literature accompanying the protester's bid and concluded that it could not be determined whether the protester's non-brand name products for line items 0002 through 0008 conformed to the salient characteristics listed in the IFB for the brand name items. Specifically, the literature furnished by the protester did not establish that the condenser fan/motor assemblies of the products offered in response to line items 0002 and 0003 were manufactured with permanently lubricated ball bearings as required, or that the products offered in response to line items 0004 through 0008 were manufactured with ball bearings as required. The agency thus rejected the protester's bid on line items 0002 through 0008 as nonresponsive, and made award to K.C. & C, the next low bidder, which had offered the brand name products in its bid.

IRC protests the agency's rejection of its bid as non-responsive, explaining that "since the lubricated ball bearings were such a standard and integral part of the motors used in our equipment, we did not feel they warranted specific mention in our literature."

To be responsive to a brand name or equal solicitation, bids offering "equal" products must conform to the salient characteristics of the brand name products listed in the solicitation. Cagle Welding & Equip., Inc., B-247199, Apr. 10, 1992, 92-1 CPD ¶ 359. Where, as here, descriptive literature is required to establish the bid's conformance with the specifications, and bidders are so cautioned, the bid must be rejected as nonresponsive if the literature submitted fails to show that the offered products conform to the listed salient characteristics. Joaquin Mfg. Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15. Thus, even if the offered products, in fact, possess the required features, bid rejection is required when the literature submitted with the bid does not clearly show conformance with these requirements. Alternate Power and Energy Corp., B-228746, Nov. 3, 1987, 87-2 CPD ¶ 440.

We have reviewed the record and find that the agency acted properly in rejecting as nonresponsive IRC's bid on line items 0002 through 0008. As conceded by the protester, the descriptive literature furnished by IRC with its bid simply did not provide that the condenser/fan motor assemblies of the products offered are manufactured with permanently lubricated ball bearings or ball bearings, even though these features are listed in the IFB as salient characteristics.

While the protester suggests that it could have resolved its apparent nonresponsiveness, the agency could not permit IRC to explain its bid after bid opening, since bid responsiveness must generally be ascertained from the bid documents themselves, not from explanations or clarifications provided by the bidder after bids have been opened and bid prices exposed. Crash Rescue Equip. Serv., Inc., B-245653, Jan. 16, 1992, 92-1 CPD ¶ 85.

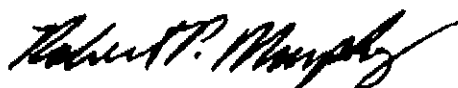
The protester also argues that K.C & C is not a small business eligible for award under this solicitation. The Small Business Act, 15 U.S.C. § 637(b)(7) (1988), gives the Small Business Administration (SBA), not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.3(m)(2) (1993); Survive Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. Thus, we will not review IRC's challenge to K.C & C's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for federal procurement purposes. Survive Eng'g Co., *supra*; Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297.

The protester also questions the legal status of K.C & C as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1988). Under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(9), our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act. By law this matter is to be decided by the contracting agency, in the first instance, subject to review by the SBA where a small business is involved, and the Secretary of Labor. The Pratt & Whitney Co., Inc.; Onsrud Machine Corp., B-232190; B-232190.2, Dec. 13, 1988, 88-2 CPD ¶ 588.

In any event, because IRC's bid was nonresponsive, and there are apparently other responsive bidders that could be awarded the contract if K.C & C was found ineligible for award, IRC lacks the direct economic interest necessary to be an interested party eligible to protest K.C & C's eligibility for award. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct

economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A bidder not next in line for award under these circumstances does not have the requisite economic interest. See Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247.

The protest is denied in part and dismissed in part.



*for* James F. Hinchman  
General Counsel